No. 88-2001

FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RANDALL SILVER and MIKALA SILVER, individually and as parents and next of kin of MICHAEL R. SILVER, Deceased, minor child,

Petitioners,

vs.

FARMERS AND MERCHANTS INSURANCE COMPANY,

Respondent.

CORRECTED

APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

VOLUME II - APPENDICES E - I

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APPENDIX B

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child,	)	
Plaintiffs,	)	
vs.	)	No. C-84-781T
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants.	)	

SECOND AMENDED PETITION

I.

On the 3rd day of November, 1983, the Plaintiffs' minor child, Michael R. Silver, now deceased, was walking in his neighborhood in a northerly direction along the east curb of Stubbeman Avenue, approximately 56 feet South of Ridge Road in Norman, Cleveland County, Oklahoma, when Christine Annette Slusher, driving a 1977 Pontiac Bonneville motor vehicle travelling on Stubbeman Avenue in a northerly direction

behind Michael R. Silver, failed to see the minor, Michael R. Silver, and caused the vehicle she was driving to violently strike Michael R. Silver causing fatally crushing bodily injuries to Michael R. Silver, his eventual death and the damages to the Plaintiffs.

II.

Michael R. Silver was a minor male child who would have been 13 years old on June 2, 1984, if he had lived until that date; he was at the time of his death residing with his parents, Randall Silver and Mikala Silver, in the City of Norman, Cleveland County, Oklahoma, and had resided with them during his entire lifetime.

III.

The Defendant, Christine Annette Slusher, also known as Christine Annette Stingley, is a resident of Canadian, Texas. The Defendant Ken Becknell is a resident of Cleveland County, Oklahoma. The Defendant, Ricky B. Henderson, is a resident of Cleveland County, Oklahoma. The Defendant, Farmers & Merchants Insurance Co. is an Oklahoma insurance company doing business in Cleveland County, Oklahoma. All transactions and occurrences occurred in the County of Cleveland, State of Oklahoma.

IV.

Plaintiffs allege that there has been no Personal Representative appointed for the Estate of Michael R. Silver, and that no probate procedure has been had upon said Estate; that these Plaintiffs are married, are now husband and wife, and are the surviving and next of kin of Michael R. Silver, deceased, and are the parties entitled to maintain and to prosecute this action as the next of kin; that Michael R. Silver had never been married and had left no issue.

V.

Plaintiffs allege that the Defendant Ken Becknell was the owner of the 1977 Pontiac Bonneville motor vehicle being driven by the Defendant Christine Annette Slusher. Defendant Becknell either knowing or having the ability to know that Defendant Slusher was a careless, reckless, and negligent driver, who had, upon prior occasions, been arrested, convicted and paid fines for traffic offenses and violations and that she was on this occasion under the influence of an intoxicant, negligently entrusted his vehicle to her and permitted her to drive it upon the public streets and highways of the City of Norman and that by reason thereof the Defendant Ken Becknell is guilty of carelessness and negligence to proximately cause

Plaintiffs' damage and the wrongful death of their child.

VI.

Plaintiffs further allege that the Defendant, Ken Becknell, was doing business under the name of Cowboy Country in Cleveland County. That Cowboy Country was at the time of this incident and all times pertinent hereto a club selling intoxicating liquors. That the agents, servants and employees of Ken Becknell furnished alcoholic beverages to Christine Annette Slusher until she became intoxicated and knowingly delivered and furnished alcoholic beverages to her subsequent to her intoxication, all immediately prior to her driving the vehicle entrusted to her by Ken Becknell and in violation of Section 537 of Title 37, Oklahoma Statutes (1981) which provides:

> No person shall: . . .
>
> (2) Sell, deliver or knowingly furnish alcoholic beverages to an intoxicated person or to any person who has been adjudged insane or mentally deficient.

By reason thereof, the Defendant Ken Becknell is guilty of carelessness and negligence to proximately cause Plaintiffs' damage and the wrongful death of Plaintiffs' child.

VII.

Plaintiffs allege that Defendant Ricky B. Henderson was a passenger in the 1977 Pontiac Bonneville motor vehicle being driven by the Defendant Christine Annette Slusher and owned by the Defendant Ken Becknell. Defendant Henderson was also under the influence of an intoxicant at the time of the automobile-pedestrian collision and negligently and carelessly failed to warn and remonstrate his driver regarding her lookout for the minor child; her observing the child upon the roadway; her maintaining her vehicle under reasonable control; her excessive speed; her utilizing the means at hand so as to prevent the motor vehicle from colliding and striking Michael R. Silver; her devotion of her time and attention to the operation of the motor vehicle; her careless method of operating the vehicle; her failure to sound a warning signal of her approach; her driving in a wanton and reckless manner without regard to the safety of any other person; her driving while under the influence of an intoxicant; her driving too close to the curbing; her driving in such a manner as to be unable to bring the vehicle to a stop within the assured clear distance ahead.

VIII.

Plaintiffs allege that Defendant, Christine Annette Slusher,

was guilty of carelessness and negligence at the time and place of this automobile-pedestrian collision to proximately cause the injuries and damages in the following particulars:

(a) She failed to keep a proper lookout for this minor child and other children that were likely to be in said street, which is located in a thickly populated section of the City of Norman where many small children reside, all of which was known or by the exercise of ordinary care should have been known by said Defendant;

(b) She failed to operate the vehicle she was driving with the proper precaution upon observing any child upon the roadway and in violation of Section 20-501(3) of the Code of the City of Norman, Oklahoma, 1976, which provides:

> " . . . no driver shall operate a vehicle other than to: . . . (3) exercise proper precaution upon observing any child or confused or incapacitated individual upon the roadway."

(c) She failed to keep the automobile she was driving under reasonable control;

(d) She was operating the vehicle she was driving at a speed in excess of that which was reasonable and proper under the circumstances then and there existing, such circumstances being the residential nature of the street, other traffic upon the roadway and the presence of Michael R. Silver and in violation of Section 20-1004(a) of the Code of the City of Norman, Oklahoma, 1976, which provides:

"Notwithstanding the maximum speed limits enumerated in this Article, no person shall drive a vehicle upon any alley, highway, roadway, street, or public parking area at a speed greater than or less than is reasonable or prudent under the conditions then existing considering visibility, amount of traffic, condition of roadway surface, presence of pedestrians, obstruction of view, and other similar factors."

(e) She failed to employ the means at hand, such as the brakes and steering mechanism so as to prevent the motor vehicle she was driving from colliding and striking Michael R. Silver;

(f) She failed to devote her full time and attention to the operation of the motor vehicle she was driving so as to cause the collision;

(g) She failed to operate the vehicle she was driving as a careful and prudent operator of motor vehicles in that she failed to exercise that degree of care that a reasonable and prudent person would exercise in the operation of their vehicle under the circumstances without due caution or circumspection and at a careless, needless and dangerous rate of speed and in violation of Section 20-502 of the Code of the City of Norman, Oklahoma, 1976, which provides:

"No person shall operate a vehicle carelessly, without due caution and circumspection, or in a manner so as to endanger

or be likely to endanger any person or property."

(h) She failed to sound the horn or give any signal warning of her approach in an effort to avoid or warn Michael R. Silver and in violation of Section 20-501(2) of the Code of the City of Norman, Oklahoma, 1976, which provides:

> ". . . no driver shall operate a vehicle other than to: . . .(2) give warning by sounding the horn when necessary . . ."

(i) She failed to exercise that care required to avoid colliding with a pedestrian upon the roadway and in violation of Section 20-501(1) of the Code of the City of Norman, Oklahoma, 1976, which provides:

> " . . . no driver shall operate a vehicle other than to: (1) exercise due care to avoid colliding with any pedestrian upon any roadway. . ."

(j) She operated the vehicle she was driving in a wanton and reckless manner without regard for the safety of any person an din violation of Section 20-519 of the Code of the City of Norman, Oklahoma, 1976, which provides:

> "No person shall operate a vehicle wantonly, without regard for the safety of any person or property . . ."

(k) She operated the vehicle she was driving while under the influence of an intoxicant, and in violation of Section 20-526 of the Code of the City of Norman, Oklahoma,

1976, which provides:

> "No person shall operate a vehicle while under the influence of any alcohol, amphetamine, barbiturate, narcotic, marijuana, or other chemical which may render a person incapable of safely driving a vehicle, notwithstanding whether that substance was lawfully prescribed to that person."

(l) Defendant carelessly and negligently operated the vehicle she was driving too close to the curbing and thereby violently striking Michael R. Silver knocking him to the street.

(m) She failed to operate the vehicle she was driving in such a manner so as to bring the same to a stop within the assured clear distance ahead and in violation of Section 20-1004(b) of the Code of the City of Norman, Oklahoma, 1976, which provides:

> "No person shall drive any vehicle upon a street at a speed greater than would permit him to bring it to a stop within the assured clear distance ahead."

IX.

As a direct and proximate result of the Defendants' negligence, the minor, Michael R. Silver, was injured and killed and these Plaintiffs were damaged, the extent of which is more specifically hereinafter set forth. The Plaintiffs allege that the

minor, Michael R. Silver, was without fault in the premises and the sole and proximate cause of the collision and resulting damages were the acts of negligence and want of due care exercised by the Defendants and each of them to make them jointly and severally liable to the Plaintiffs.

X.

Michael R. Silver was age 12 on the date of the collision and had a reasonable life expectancy of 57.9 more years. The blow from the vehicle caused Michael R. Silver to be thrown against the pavement causing him to suffer severe and fatally crushing bodily injuries. Plaintiffs' decedent survived the collision for a period of time and endured great and massive mental and physical pain and suffering until he died as a result of the collision entitling Plaintiffs to a judgment in the sum of $500,000.00. Plaintiffs have incurred medical and burial expenses for the care of their deceased child so as to entitle Plaintiffs to a judgment in the additional sum of $5,613.71. At the time of the injuries and death of Michael R. Silver, he was a strong, healthy, little boy and was an intelligent, loving and obedient son and would have rendered valuable services and support to the Plaintiffs. Michael R. Silver was gainfully employed and provided support to the family income. The

collision has destroyed the parent/child relationship and caused grief and loss of the companionship and love of the child to the Plaintiffs and their family. Plaintiffs witnessed the injuries to their son and have suffered great emotional distress therefrom. Plaintiffs have also suffered the loss of monies expended in support, maintenance and education of their child. Randall Silver, Mikala Silver, Kelly Silver, Matt Silver, Steve Silver and Susie Silver, are the only next of kin who have sustained a pecuniary loss by reason of the acts and omissions of the Defendants in the wrongful death of the minor child, Michael R. Silver, for which Plaintiffs are entitled to judgment in the additional sum of $3,000,000.00.

XI.

Plaintiffs allege that Defendant, Christine Annette Slusher, failed to stop the vehicle she was driving after striking the Plaintiffs' decedent and rendering all reasonable assistance to the injured child and further the Defendants, and each of them, secreted Christine Annette Slusher from the police, failing to inform them of the occurrence and location of the collision, all in violation of Section 20-301 of the Code of the City of Norman, Oklahoma, 1976, which provides:

(a) All drivers involved in an accident, whether

with another vehicle, private or public property, a pedestrian or singly, shall (1) immediately bring their vehicle to a stop; (2) render all reasonable assistance to any injured individuals, taking all reasonable steps to secure immediate medical attention for such injured person; (3) inform the police of the occurrence and location of the accident;

* * *

(c) After having complied with the appropriate above subsection, a driver may leave the scene of an accident if:

(1) Released by an officer of the City Police Department; or

(2) Such driver is required to make an immediate emergency run to the hospital for medical treatment of any person involved in the accident; or

(3) No person is either injured or killed and the total apparent damage to all vehicles or property involved in the accident is less than $100.00.

Plaintiffs allege that the acts of the Defendant, Christine Annette Slusher, in operating her vehicle at a high rate of speed in a residential district while in a drunken condition, illegally and in violation of the Ordinances of the City of Norman; the negligent entrustment of the vehicle to a person known or should have been known to have been intoxicated by Ken Becknell; and the failure of Defendant Henderson to remonstrate and warn and stop the Defendant Slusher from

operating her motor vehicle in the manner in which she was and in her intoxicated state was grossly negligent, and they maliciously, willfully, wantonly and intentionally committed said acts with reckless disregard for other persons on the streets of the City of Norman and specifically Plaintiffs' decedent; the Defendants, Christine Annette Slusher, Ken Becknell, and Ricky B. Henderson knew or should have known that the drunken and intoxicated condition of Christine Annette Slusher, might and would produce injuries to other persons such as pedestrians upon the streets of the City of Norman and that the conduct of leaving the accident scene without rendering assistance and reporting as required demonstrates a depravity so as to entitle Plaintiffs to a judgment for punitive, or exemplary damages, against the Defendants and each of them in the sum of $6,000,000.00.

XII.

At the time of the collision, the individual Defendants were uninsured motorists under the terms of the Statutes of the State of Oklahoma. Further, liability of these individual Defendants for the damages to the Plaintiffs are reasonably clear under the facts of this case and under the laws of the State of Oklahoma. At the time of the collision, Randall Silver

was the owner of three (3) motor vehicles on which he had purchased from Farmers & Merchants Insurance Co. three (3) policies of insurance, each of which provided $10,000.00 per person and $20,000.00 per occurrence liability coverage. Such policies were in full force and effect at the time of the collision herein. Plaintiff, Randall Silver, paid an additional premium for each of the motor vehicle policies. At the time Randall Silver purchased the insurance policies from the Defendant, Farmers & Merchants Insurance Co., the Defendant, Farmers & Merchants Insurance Co. failed to inform the Plaintiff that uninsured motorist coverage would cover Plaintiffs and their deceased son if damage occurred by an uninsured motorist or motor vehicle. Rather, said Defendant improperly informed Plaintiff, Randall Silver, that uninsured motorist insurance would only cover property damage if Plaintiffs or their family members were involved in a collision with an uninsured motorist. Such failure to properly and fully inform Plaintiffs as to the available coverage induced Plaintiff, Randall Silver, to sign a rejection of such uninsured motorist coverage. Due to the failure of Defendant, Farmers & Merchants Insurance Co., to properly, fully and adequately inform Randall Silver of the uninsured motorist coverage ,

Randall Silver lacked the requisite informed consent to sign a rejection of such coverage. Due to the failure of Defendant, Farmers & Merchants Insurance Co., to adequately and properly inform Randall Silver of the uninsured motorist coverage and the damages sustained by Plaintiffs and their decedent, and because of such insurance policies of the Defendant, and of the facts in this case, Plaintiffs are entitled to judgment against Farmers & Merchants Insurance Co. for all damages in the sum of $9,505,613.71.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in the sum of $9,505,613.71 plus interest thereon at the rate of fifteen percent (15%) per annum from the date of commencement, together with costs and such other and further relief that the Court may deem just and proper.

CLIFTON D. NAIFEH
470 Sooner Federal Building
Norman, Oklahoma 73069
(405) 329-2732

ATTORNEY FOR PLAINTIFFS

ATTORNEY'S LIEN CLAIMED.

CERTIFICATE OF MAILING

I certify that on the _____ day of _____, 1984, a true and correct copy of the above and foregoing SECOND AMENDED PETITION was mailed, postage prepaid, to: Mr. Coy H. McKenzie, 209 S. Crawford Avenue, Norman, Oklahoma 73069, Attorney for Defendant Ken Becknell.

_____
CLIFTON D. NAIFEH

APPENDIX E

APPENDIX F

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child,	)	
Plaintiffs,	)	
vs.	)	No. C-84-781T
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants.	)	

A N S W E R

For answer to plaintiffs' second amended petition filed herein, defendant, Farmers and Merchants Insurance Company alleges and states:

1.

Defendant specifically denies each and every allegation concerning uninsured motorist coverage, affirmatively states that plaintiffs had no uninsured motorist coverage with this defendant at the time of the accident in question, and demands strict proof thereof.

3.

Defendant denies all of the allegations concerning failure to inform plaintiffs concerning uninsured motorist coverage, states that plaintiffs were properly informed and made an informed rejection of uninsured motorist coverage, and demands strict proof to the contrary.

WHEREFORE, having fully answered, defendant Farmers and Merchants Insurance Company prays that the plaintiffs take nothing by reason of their second amended petition filed herein and that they be dismissed hence with their costs.

LEE, BEUCH, DAVIS, BARNETT
AND DUROCHER

By _____
Jim W. Lee (OBA #5336)
P. O. Box 44188
Oklahoma City, Oklahoma 73144
Phone: 405/691-8573

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing ANSWER was mailed this _____ day of December, 1984, to the following counsel of record:

Mr. Clifton D. Naifeh
Attorney at Law
470 Sooner Federal Building
Norman, Oklahoma 73069

_____
Jim W. Lee

APPENDIX G

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child,	)	
Plaintiffs,	)	
vs.	)	No. C-84-781T
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants.	)	

MOTION TO DISMISS

Defendant, Farmers and Merchants Insurance Company, moves this Honorable Court to dismiss this action as to it, and for its reasons would advise this Court as follows:

1.

There is no justifiable cause of action against this defendant and in favor of the plaintiffs under the laws of the State of Oklahoma.

The testimony of plaintiffs, by deposition, and the evidence of documentation in defendant's file reveals that plaintiffs have consistently rejected uninsured motorist coverage from at least 1975 to date, and to and after the date of the incident giving rise to this lawsuit, and that such rejections are in the form of written, signed rejection of coverage.

WHEREFORE, defendant prays that this Court dismiss plaintiffs' action against this defendant and that this defendant be awarded costs and attorneys' fee by reason of having to defend plaintiffs' abuse of civil process and defendant's being required to defend a groundless action.

Respectfully submitted,

LEE, BEUCH, DAVIS AND DUROCHER

By_____
Jim W. Lee (OBA #5336)
Attorney at Law
P. O. Box 44188
Oklahoma City, Oklahoma 73144

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing MOTION TO DISMISS was hand delivered to the following counsel of record this 3rd day of June, 1985:

Mr. Clifton D. Naifeh
Attorney at Law
470 Sooner Federal Building
Norman, Oklahoma 73069

_____
Jim W. Lee

APPENDIX G

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child,	)	
Plaintiffs,	)	
vs.	)	No. C-84-781T
CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO.,	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant respectfully submits to this Honorable Court that plaintiffs have no cause of action against it under the laws of the State of Oklahoma, and further advises this Honorable Court that plaintiffs have consistently rejected uninsured motorist coverage since at least 1975, as evidenced by plaintiffs' own testimony and the attached exhibits from defendant's underwriting file, marked "Exhibit A," "Exhibit B," "Exhibit C," "Exhibit D," and "Exhibit E."

Plaintiffs were originally insured with Dairyland Mutual Insurance Company, then with State Farm Insurance Company, and finally with defendant Insurance Company.

When asked if plaintiffs carried uninsured motorist coverage with Dairyland Mutual Insurance Company, plaintiff Randall Silver responded at Page 32 of his deposition, beginning at line 5, as follows:

"Q Okay. When were you insured with Dairyland Mutual?

A When I was about age sixteen.

Q For how long, sir?

A Two or three years as far as I know. I can't remember for sure.

Q Did you have uninsured motorist coverage with them?

A Not that I recall."

When asked if he had uninsured motorist coverage with State Farm Insurance Company, plaintiff responded at page 36, line 17, as follows:

"Q All right. Do you ever recall having uninsured motorist coverage with State Farm?

A Not that I recall."

Plaintiffs, Randall Silver and Mikala Silver, have consistently requested and received the minimum State liability insurance coverage requirement so that they could legally drive their vehicle under the laws of the State of Oklahoma. When asked regarding the type of coverage requested from this defendant, plaintiff Mikala Silver testified, at page 12, beginning with line 10 in her deposition, as follows:

"Q All right. And did you go over the policy coverage with the agent while you were there at his office and did he explain to you what he had done so you knew for sure it was what you-all wanted?

A I don't recall.

Q Well, Mrs. Silver, would you normally go somewhere and pay for something if you weren't sure that it was what you wanted?

A Not usually.

Q Well, wouldn't it be fair to presume, if you don't recall, that you were satisfied that what you got was what you asked for?

A Yes, sir.

Q All right. Do you remember what you asked for other than State minimum coverage to allow you to drive the care under the State law?

A To the best of my recollection that is what we asked for."

Continuing in her deposition at page 19, plaintiff Mikala Silver, testified as follows:

"Q All right. Now, Mrs. Silver, at any time during the time that you-all had insurance with Farmers & Merchants Company, at any time during that time did you have any conversation with anybody, an insurance company agent, an independent agent that sold you the policy, a lawyer, a preacher, or anybody about what was the coverage you had?

A No, sir.

Q So, would it be fair to say that as far as you know the coverage that you had on your cars was the minimum required coverage and that's all and you never inquired about anything else about your coverage; is that right?

A That's right."

Plaintiff Mikala Silver testified that she read the insurance policy and documents which she signed and which were signed by her husband. At page 18 of her deposition, beginning at line 10, plaintiff Mikala Silver testified as follows:

"Q (By Mr. Lee) Did I understand you to say that you had read the policies?

A (No answer)

Q Read through the policies?

A I skimmed through them, yes."

Q All right. And I also understood you to say that you have seen those documents and read through the documents that your husband previously identified. (Attached Exhibits B, C, D, and E.) That is what you have testified to already. Is that correct?

A Yes, sir.

Q All right. And you realized from reading through those documents that you were rejecting uninsured motorist coverage.

Is that correct?

A To the best of my knowledge, yes, sir."

The Court is respectfully referred to attached "Exhibit A," which is a REJECTION OF UNINSURED MOTORIST VEHICLE INSURANCE COVERAGE, obtained by independent agent Jack A. Moss and pretaining [sic] to Policy No. A418111, effective December 8, 1975, and signed by insured, Mikala M. Silver. That document provides in part, as follows:

> "The coverage (rejected) provides for the protection of persons insured under this policy who would be legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury, sickness or disease, including death resulting therefrom. (Emphasis provided)

The Court is also respectfully referred to "Exhibits B, C, D and E," which are signed rejections of uninsured motorist

coverage. The signed rejections have a place for the insured to mark that uninsured motorist coverage with limits of liability for bodily injury is desired, or that uninsured motorist coverage is rejected. The plaintiffs herein have consistently rejected uninsured motorist coverage as evidenced by the signatures of plaintiff Mikala M. Silver, Randall Silver, and Mrs. Geraldine Silver, mother of plaintiff Randall Silver.

The Supreme Court of the State of Oklahoma has held in the case of National Fire Insurance Company of Hartford v. McCoy, 239 P.2d 428, in the syllabus by the Court, that:

> "2. A contract in writing, if its terms are free from doubt or ambiguity, must be permitted to speak for itself, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts, and this principle is applicable to contracts of insurance."

The Court further provided, in Syllabus No. 1, that:

> "1. To justify change in written contract on the ground of mutual mistake, proof is required that written instrument does not express real contract, and that error, if any, was occasioned through mistake that was mutual, and evidence must be clear, satisfactory, free from doubt, and show that party who seeks reformation was free of neglect in making of agreement."

Plaintiffs herein have consistently rejected uninsured motorist coverage and have signed a rejection slip which describes the coverage which they have rejected. They have further consistently requested coverage from an independent insurance agent, not a policy-writing agent, but their own agent, not an employee of this defendant, which provided only the minimum required liability coverage under the laws of the State of Oklahoma and they have not ever, at any time, requested uninsured motorist coverage until after the incident giving rise to this lawsuit occurred.

All the evidence in this case is that the policy written by this defendant and carried by the plaintiffs was the policy that plaintiffs wanted and intended to carry and did not have any uninsured motorist coverage. The plaintiffs have never asked for nor have they ever paid for uninsured motorist coverage.

In the case of C.R. Wright and G. L. McKinney, co-partners, doing business as Wesco Insurance Agency, a fictitious partnership, Plaintiff, v. Hartford Accident and Indemnity Company, a corporation, Defendant, 258 F.Supp. 841 (1966), United States District Court for the Western District of Oklahoma case, Judge Daugherty, the Trial Judge, held that:

> "Liability insurer had no liability to insured for property damage liability claim where it had not been asked for and had not agreed to property damage coverage until after loss involved." (Emphasis added.)

The Court went on to say that:

> "Insured who orders property damage liability coverage from agency, which fails to procure coverage, can recover from agency for this negligence or other breach of duty upon insured's incurring liability for property damage loss."

In the case before this Court for review, the insureds' independent agent was an agent of the insured and not an employee, policy-writing agent, with authority to bind, of this defendant. This defendant received applications from insured's agent and wrote or rejected policies of insurance based upon those applications. These insureds, plaintiffs herein, had no insurance coverage for uninsured motorist benefits at the time the incident giving rise to this lawsuit occurred. If the agent failed to properly inform the insureds, which is not admitted but is specifically denied, but for purposes of argument is suggested, then, plaintiffs may have a cause of action against an agent who failed to properly inform them or write proper coverage. Under no circumstances do these plaintiffs have a cause of action against this defendant under the laws of the

State of Oklahoma, the testimony of the plaintiffs themselves or the evidence in this case.

Therefore, defendant respectfully submits that the Motion to Dismiss should be sustained and that they should be awarded costs, expenses and attorneys' fees in a reasonable amount to be determined by the Court.

Respectfully submitted,

LEE, BEUCH, DAVIS AND DUROCHER

By_____
Jim W. Lee (OBA #5336)
P. O. Box 44188
Oklahoma City, Oklahoma 73144
Phone: 405/691-8573

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS was hand delivered this 3rd day of June, 1985, to the following counsel of record:

Mr. Clifton D. Naifeh
Attorney at Law
470 Sooner Federal Building
Norman, Oklahoma 73069

_____
Jim W. Lee

APPENDIX G

APPENDIX H

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child,	)	
Plaintiffs,	)	
vs.	)	No. C-84-781T
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Defendants.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF REQUEST FOR TRIAL BY JURY

FACTS

The material facts of the above-styled action are as follows:

1. The decedent, Michael R. Silver, was struck and killed on the 3rd day of November, 1983, by the acts of gross negligence of the Defendant Christine Annette Slusher Stingley, and Defendant Ken Becknell, the driver and owner, respectively, of the offending vehicle. The Court has directed a verdict against Ms. Slusher and a jury had returned a verdict against Mr. Becknell.

2. Plaintiffs requested a jury trial against Farmers & Merchants Insurance Co. concurrent with that of the co-Defendants.

3. The Court, upon the Defendant's Motion to Bifurcate, sustained such Motion and ordered a separate trial.

4. The day after the jury verdict and the Judge directed a verdict, the Plaintiffs and Defendant Farmers & Merchants Insurance Co. returned to docket call of the same jury term and were informed by the trial court that the remaining issue was a matter of law and was to be tried to the Court which was set over for hearing on June 4, 1985, at 1:30 p.m. to which ruling Plaintiffs except.

5. On June 4, 1985, at 1:30 p.m., the Court, after conference with the parties, determined that the matter should be submitted upon Stipulation and/or briefs to which the Plaintiffs duly excepted having again requested a trial by jury.

6. This matter now comes before the Court upon the issue of whether there was a knowing rejection by the policyholder of uninsured motorist coverage.

7. At the time of the collision, Plaintiff, Randall Silver, parent of the decedent, was the owner of three (3) motor vehicles for which he purchased three (3) policies of insurance from the Defendant, Farmers & Merchants Insurance Co., each

policy providing $10,000.00 per person and $20,000.00 per occurrence liability coverage.

8. At the time said policies were purchased, Defendant Farmers & Merchants Insurance Co., failed to inform the Plaintiff that uninsured motorist coverage would cover the Plaintiffs and their deceased son for damages on account of bodily injuries or death occasioned by an uninsured motorist or motor vehicle. Defendant Farmers & Merchants Insurance Co. instead improperly and negligently informed Plaintiff that uninsured motorist coverage would insure only property damage. Relying on said misrepresentations, the Plaintiff, Randall Silver, executed rejections of uninsured motorist coverage and directed his wife to do likewise. (See Affidavits of Randall R. Silver and Mikala Silverattached [sic] hereto and made a part hereof.)

9. Due to the failure by Defendant, Farmers & Merchants Insurance Co., to properly and adequately inform Plaintiff, Randall Silver, Plaintiff lacked the necessary requisite informed consent to sign rejections of such coverage.

10. Plaintiffs request trial by jury.

PROPOSITION I.

WHETHER AN INFORMED, KNOWING AND INTELLIGENT REJECTION OF UNINSURED MOTORIST COVERAGE HAS BEEN MADE

BY A POLICYHOLDER IS A QUESTION OF FACT FOR THE JURY TO DECIDE WHERE MISREPRESENTATIONS HAVE BEEN MAD BY THE INSURER.

ARGUMENT

Plaintiffs submit that there is no question that uninsured motorist coverage was, in fact, intended to be rejected as indicated by the signed waivers accompanying each of the Plaintiffs' policies. Plaintiffs assert, however, that such rejection(s) was not a knowing, informed and intelligent waiver and that said rejection was the result of misrepresentations and omissions by Defendant and its agent.

In Oklahoma, insurers are mandatorily required to offer uninsured motorist coverage and if the insured desires not to have uninsured motorist coverage, he must so indicate by signing a written rejection of such coverage. 36 OS. § 3636.

Oklahoma case law addressing the specific issues discussed herein is not extensive. Nonetheless, Hicks v. State Farm Mutual Automobile Insurance Company, 568 P.2d 629 (Okla. 1977), discusses almost the exact question raised in this matter, that being whether or not there was a knowing and intelligent waiver of uninsured motorist coverage.

In Hicks, supra, the Plaintiffs, the insureds, brought an action against the Defendant insurance company under their

uninsured motorist coverage even though Plaintiffs had rejected such coverage. The Plaintiffs therein asserted that the rejection of coverage was not knowing or voluntary and as such Defendant carrier should honor their claim. In ruling for the Defendant, the Oklahoma Supreme Court held that:

> Where insurer mailed the insured a proposed endorsement which, if it had been accepted, would have provided the insured with uninsured motorist coverage by payment of a small additional premium charge, the policy defined such coverage in language plain enough to enable the insured to comprehend the waiver of such coverage, the policy contains strong recommendation that the insured accept uninsured motorist coverage and that the insured signed the rejection of coverage, dated it, and mailed the proposed endorsement and rejection back to the insurer, insured's waiver of uninsured motorist coverage was knowingly and intelligently made.

In the instant case, there are several features which are distinguishable from Hicks, supra. First, there was never a strong recommendation made by the Defendant Farmers & Merchants Insurance Co. to Plaintiffs, Randall and Mikala Silver, regarding the implications of not accepting uninsured motorist coverage. The Defendant's representation to the Plaintiffs indicated to the Plaintiffs that uninsured motorist insurance would cover only property damage if either the Plaintiffs or members of their family were involved in an accident with an uninsured motorist and as such is tantamount to legal fraud. At no time were the Plaintiffs informed that

such coverage would also compensate them or the immediate members of their family for personal injury or accidental death occasioned by a collision with an uninsured motorist. Misfeasance by Defendant's agents resulted in a rejection of coverage which Plaintiffs may have otherwise accepted.

Plaintiffs do not allege that the Defendant acted n bad faith or that somehow Defendant intentionally misrepresented the coverage and terms available. Obviously, it would have benefited the Defendant by way of increased premiums, to include in Plaintiffs' policy uninsured motorist coverage. Although the Defendant's misrepresentations cannot be said to have been intentionally fraudulent, the discussions resulting in the rejectment by Plaintiffs of uninsured motorist coverage were nevertheless flawed inasmuch as said representations induced reliance on the part of the Plaintiffs, Randall and Mikala Silver on false and improper representations of material facts.

One of the definitions of actual fraud found in 15 O.S. §58(2) is "the positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true." In this case, by virtue of Defendant's misstatement and omissions, Plaintiffs relied on advice and information which was incorrect, inconsistent and

detrimental to their best interest and that of their family. In fact, prior to the death of their child which precipitated this action, Plaintiffs were never informed as to the cost of uninsured motorist coverage nor did they even understand the true meaning and purpose of uninsured motorist coverage. Had the agent negotiating the policy not breached his fiduciary duty to fully inform and apprise the Plaintiffs, they could have exercised a rational, intelligent and purposeful election or rejection of coverage.

Second, in Hick, supra, there was no question involving misrepresentation or fraud. In that case a proposed endorsement was mailed to the Plaintiff defining coverage in "language plain enough to enable the insured to comprehend waiver of such coverage." In fact, the policy contained wording stating, "State Farm strongly recommends you accept this important additional protection." Hicks, supra. Plaintiffs, in the case at bar, as indicated earlier, were misinformed by the agent as to the definition of "uninsured motorist coverage." Policies were not mailed to Plaintiffs until after the rejections were endorsed. The ensuing rejection(s) was not knowingly or intelligently made.

In the Hicks, supra, decision, the Court in distinguishing Johnson v. Concord Mutual Insurance Co., 300 A.2d 61, (Pa.

1973), the case heavily relied upon by the Plaintiff therein, found Johnson distinct on two grounds. First, "the Johnson policy did not contain the strong recommendation that the insured accept the tendered uninsured motorist coverage," and, second, the policy "failed to provide an extensive explanatory statement as to what the insured was rejecting." Hicks, supra. Those factors discussed in Johnson which the Oklahoma Supreme Court therein found as important and nonexistent, likewise are nonexistent in the instant case. Simply stated, the Plaintiffs, Randall and Mikala Silver, could not have exercised a rational and intelligent rejection absent full disclosure by the Defendant Farmers & Merchants Insurance Co.

Implicit in the Hicks decision is the finding that had the Plaintiffs therein submitted the issue or claim of misrepresentation or fraud, a material fact would have been raised warranting trial by jury. Citing Brady Admx. v. Universal Underwriters Insurance Group, 307 N.E.2d 548 (Ohio, 1973), the Court in Hicks, supra, stressed that "there is no issue that the insured signed such rejection under duress or conditions showing undue influence. Neither s there a claim of misrepresentation." (Emphasis added.) By including that specific language, the Oklahoma Supreme Court indicates that had that particular issue been raised, a material question of

fact would have existed requiring resolution by a jury.

In his dissenting opinion in the Hicks, supra, Justice Doolin stated "that the Appellants by their pleadings have raised a question of fact, as to whether or not the deceased knowingly and voluntarily rejected coverage on the subsequent policy. To decide this question by summary judgment is to require the opponent of the motion to carry the burden of proof."

Plaintiffs submit that even though rejections of coverage were signed and returned to Defendant Farmers & merchants Insurance Co., the agreement created thereby had neither force nor effect since contractual consent by the Plaintiffs was lacking. Pursuant to 15 O.S. §53(5), "an apparent consent is not real or free when obtained through mistake." In O'Neal v. Harper, 75 P.2d 879 (Okla. 1938), the Court ruled that "there must be a meeting of the parties' minds on all essential elements before a contract is created." Clearly such mutual understanding did not exist between the parties involved herein. The purpose and intent envisioned by the Legislature by enacting Oklahoma's Uninsured Motorist Coverage Statute was to "provide protection against injuries suffered by reason of uninsured and financially irresponsible motorists." Hicks, supra.

The issue of whether an insurer has made an adequate offer of uninsured motorist coverage to an insured is a fact issue which must be resolved by the trier of fact. Maher v. All Nation Insurance Co., 340 N.W.2d 675 (Minn. App. 1983).

CONCLUSION

By virtue of Defendant Farmers & Merchants Insurance Co.'s fiduciary duty with the Plaintiffs, the burden of full disclosure rested upon any party acting on behalf of the Defendant. The representations made to the Plaintiffs with respect to uninsured motorist coverage were insufficient to allow a knowing, rational, and intelligent choice regarding acceptance or rejection of such coverage. Any assertion by Defendant that the written rejections of coverage contained in Plaintiffs' policies conclusively indicates a rational, intelligent and knowing choice, overlooks the question or issue as to how or under what circumstances such rejections were obtained. In view of the Plaintiffs' allegations with respect to the nonexistence of a knowing and intelligent waiver, it would be fundamentally inappropriate to dispose of this matter absent determination of liability by a jury.

WHEREFORE, premise considered, Plaintiffs respectfully urge this Honorable Court to submit the issues raised herein for determination by a jury.

Respectfully submitted,

NAIFEH & WOSKA
A PROFESSIONAL CORPORATION

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF HAND DELIVERY

I certify that on the 1st day of July, 1985, a true and correct copy of the above and foregoing PLAINTIFFS' BRIEF IN SUPPORT OF REQUEST FOR TRIAL BY JURY was hand delivered to: Mr. Jim W. Lee, Attorney for Defendant, Farmers & Merchants Insurance Co., and Mr. Coy H. McKenzie, Attorney for Defendant, Ken Becknell.

_____
CLIFTON D. NAIFEH

APPENDIX I

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

SILVER, PLAINTIFF

-vs- CASE NO. C-84-781T

FARMERS, DEFENDANT(S)

DATE: 4 June 85 Judge: T

Question of uninsured motorist to be submitted on stipulations and/or briefs 9 a.m. 1 Jul 85 Farmers M to D: OR

signed: PT

APPENDIX I